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(5)

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 2005

CASE NO. 06-5306

KEITH BOWLES

Petitioner

vs.

HARRY RUSSELL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether an appellate court may ***sua sponte*** dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

OPINIONS BELOW

The United States Court of Appeals issued a published opinion which is reported at432 S.3d 655 (6th Cir. 2005).

The United States Disfrict Court for the Northern District did not issue a published opinion. A copy of the relevant District Court judgments and orders are attached.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit filed its opinion and judgment dismissing the case for lack of jurisdiction on December 28, 2005. Petitioner timely filed a petition for a rehearing and a suggestion for a rehearing en banc. On April 21, 2006, the United States Court of Appeals for the Sixth Circuit denied the petition for a rehearing. The statutory provision believed to confer jurisdiction is 28 U.S.C. §1257.

RULE OF APPELLATE PROCEDURE INVOLVED

RULE 4(a)(6) of the Federal Rules of Appellate Procedure

(a) Appeal in a Civil Case

* * *

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied.

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the movinf party received notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C)the court finds that no party would be prejudiced.

Rule 26(b)(1) of the Federal Rules of Appellate Procedure.

> **(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

STATEMENT OF THE CASE

Petitioner Keith Bowles, instituted this action seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County, Ohio. Petitioner was convicted of murder and sentenced to a term of imprisonment of fifteen (15) years to life. His petition was filed on August 5, 2002. Respondent filed a return of writ on October 24, 2002.

Petitioner thereafter filed his traverse to the return of writ and his brief on December 2, 2002.

The Magistrate Judge, on May 23, 2003, issued a report and recommendation recommending that the petition be denied. Petitioner thereafter filed his objections and exceptions to the report and recommendation of the Magistrate Judge on June 27, 2003. Respondent filed a response to petitioner's objections on July 10, 2003.

On the same day, July 10, 2003, the District Court filed its memorandum and opinion adopting the Magistrate Judge's report and recommendation together with a concurrent judgment entry dismissing the petition for writ of habeas corpus.

Petitioner thereafter filed a motion for a new trial or to alter and amend judgment on August 6, 2003. The District Court denied the motion in an order which was not served

on either petitioner or his attorney. Thereafter, petitioner filed a motion to vacate and to reopen the time for the appeal on December 12, 2003. The District Court, on February 10, 2004, granted the motion to reopen the appeal time. Thereafter petitioner, on February 26, 2004, filed his notice of appeal.

On December 28, 2004, the Court of Appeals issued a certificate of appealability on the following issue:

> **[W]hether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. ...**

The United States Court of Appeals for the Sixth Circuit dismissed the appeal stating that petitioner did not file a timely notice of appeal within the time specified by the Rules of Appellate Procedure although the notice of appeal was filed timely in accordance with the extension of time properly granted by the United States District Court. Petitioner sought a rehearing en banc or a rehearing from the original panel. This motion was denied on April 21, 2006.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the Court of Appeals misinterpreted, misapplied tRule 4(a)(6) of the Federal Rules of Appellate Procedure. Petitioner timely filed a notice of appeal within the time specified by the United States District Court when it had granted petitioner's motion to reopen the time for appeal. The District Court had that authority. The reasoning of the United States Court of Appeals for the Sixth Circuit conflicts with decisions by this court concerning timeliness of a notice of appeal.

ARGUMENT

THE DISTRICT COURT MAY PROPERLY GRANT AN EXTENSION OF TIME WHEN IT GRANTS A MOTION TO REOPEN AN APPEAL.

The issue in this case concerns the authority of a District Court to extend the time to file a notice of appeal beyond the fourteen (14) days authorized by Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

The Court of Appeals ruled that the District Court did not have authority to grant more than fourteen (14) days to file a notice of appeal. Thus, it was deprived of jurisdiction. However the extension granted by the District Court was only involve's a claim processing rule which was not a jurisdictional barrier.

In this regard the Sixth Circuit decision conflicts with the recent pronouncement by the United States Supreme Court in ***Eberhart v. United States***, 126 S.Ct. 403 (2005).

The Court of Appeals in this case, in its opinion announced December 28, 2005, dismissed petitioner's appeal reasoning that the District Court, which had granted petitioner's request to reopen his appeal, had allowed the appeal to be filed beyond the fourteen-day period specified by Rule 4(a)(6)of the Federal Rules of Appellate Procedure.

This court, @ page 1 of the opinion ruled, **"that the fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy, or grace."** However that conclusion was flawed for a number of reasons.

First, petitioner properly and timely sought relief in the District Court. The District Court found merit in petitioner's motion to reopen the time for appealing. However, the District Court, through no suggestion from petitioner, extended the fourteen (14) day time

beyond specified by the rule. Petitioner, relying on the District Court's order, filed his notice of appeal within the time specified by the District Court.

Petitioner's situation is analogous to ***Eberhart v. United States***, 126 S.Ct.403 (2005). In ***Eberhart***, the Supreme Court considered an untimely filing of a motion for a new trial in a criminal case which motion was required to be filed within seven (7) days after the verdict or finding. In ***Eberhart*** the defendant filed his motion for a new trial beyond that period of time. Thus his appeal was thereafter dismissed by the Court of Appeals as being untimely. Upon review by the United States Supreme Court the court ruled that there was a critical difference between a rule governing subject matter jurisdiction and an inflexible claim-processing rule, citing ***Kontrick v. Ryan***, 540 U.S. 443, 456 (2004).

However the opinion in this case is flawed because the Court of Appeals failed to consider petitioner's motion to reopen the appeal was timely filed. However, inadvertently and without suggestion from petitioner, the District Court granted petitioner time to file a notice of appeal beyond the fourteen (14) day period specified in the rule. Consequently this was not a situation where the application to reopen the appeal filed by petitioner was filed outside any time limitations specified in Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

The Court of Appeals went to great length to distinguish the Supreme Court decision in ***Harris Truck Lines, Inc. V. Cherry Meat Packers, Inc.***, 371 U.S. 215 (1962), where the Supreme Court concluded that a district court's granting of an extension of time to appeal to a civil litigant to file a notice of appeal was proper even if it was not in strict conformity with the rule.

Second, even if it be assumed that the District Court was in error in granting the requested extension, and inadvertently granted an extension beyond that allowed by the rule that order was appealed by petitioner as was the denial of his motion to vacate.

Consequently, if that were an error then the remedy in the Court of Appeals would be to vacate and remand the case to the United States District Court ordering that the District Court's order be vacated and furthering ordering the District Court to enter a proper order granting an extension of time for the fourteen-day period allowed by Rule 4(a)(6) of the Federal Rules of Appellate Procedure or vacating its order denying appellant's Rule 59 motion to alter and amend judgment.

The Court of Appeals, in its opinion, avoided this solution by asserting that petitioner would not appeal a favorable decision. However it turns out the decision was not wholly favorable to petitioner. This Court of Appeals did have jurisdiction over the order being appealed. Consequently, to avoid an injustice the Court of Appeals should have vacated that order and remanded the case to the District Court with instructions to enter an order granting an extension of time for the fourteen-day period or vacating its order denying the motion to alter and amend judgment.

Third, the court misread the rules of appellate procedure governing extensions of time. Rule 4(a)(6)of the Federal Rules of Appellate Procedure, which governs the reopening of the time for an appeal, sets an outside limit of 180 days. The 180 day time limit is the only time that cannot be extended. However, Rule 26(b)(1)of the Federal Rules of Appellate Procedure provides for an extension of time. It only prohibits an extension of time to file a notice of appeal except as authorized by Rule 4 of the Federal Rules of Appellate Procedure.

Consequently the only prohibition against an extension of time would be extending the 180 day time limitation to file an application to reopen the time to appeal permitted by Rule 4 of the Federal Rules of Appellate Procedure. There was no prohibition against extending the time for the filing of a notice of appeal beyond the fourteen-day period authorized by the rule once a timely application to reopen has been filed.

Fourth, respondent should be estopped from claiming that this appeal was untimely. The only reference to untimeliness was a passing reference in the brief filed by appellee. At no time did respondent object in the District Court to either the filing of petitioner's motion to reopen the time for filing the appeal nor did he object to the District Court's granting of that motion. This situation would be governed by ***Thompson v. INS***, 375 U.S. 384 (1964), where an untimely motion for a new trial was accepted by the district court. The government did not object to the timeliness of that motion.

In this case respondent did not object to either the filing of petitioner's motion in the District Court nor the ruling by the District Court. Moreover respondent did not appeal the ruling by the District Court. Respondent should not be allowed to benefit from sitting back, saying nothing, and obliquely alluding in his brief that the Court of Appeals should dismiss the appeal. This is a form of judicial estoppel. This allowed respondent to assert two inconsistent positions. This was improper, under the judicial estoppel doctrine whose"... **purpose is 'to protect the judicial process,' ... 'by prohibiting parties from deliberately changing positions according to the exigencies of the moment, '...'** ***New Hampshire v. Maine***, 532 U.S. 368, 749-50 (2001). This applies to the government and

is applicable in a single proceedings. ***United States v. Owens***, 54 F.3d 271, 275 (6th Cir. 1995); ***United States v. McCaskey***, 9 F.3d 368, 378-79 (5th Cir.1993).

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KeithBowles.Certiorari06

No. 04-3262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

APR 21 2006

LEONARD GREEN, Clerk

KEITH BOWLES,

Petitioner-Appellant,

v.

HARRY RUSSELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and ROSE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.